No. 89-749

In the Supreme Court of the United States

OCTOBER TERM, 1989

PLAYTEX FAMILY PRODUCTS CORPORATION, PETITIONER

v.

ST. PAUL SURPLUS LINES INSURANCE CO., ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the Supreme Court of Kansas

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

I. THE KANSAS SUPREME COURT'S PERSONAL JURISDICTION RULING SHOULD BE REVIEWED BY THIS COURT

A. The Question Presented Is Important.

Virtually all of respondents' arguments attempt to establish that the Kansas Supreme Court's personal jurisdiction holding is correct. As we discuss below (at pages 5-7), those efforts are unavailing. Most significant for purposes of this Court's decision whether to grant review, however, is that respondents do not seriously challenge our contention that the Kansas Supreme Court decided an important question of federal law that warrants consideration by this Court. Thus, respondents

do not dispute that the lower federal and state courts have adopted conflicting approaches in determining the permissible scope of specific jurisdiction (see Pet. 17-20) and that the issue is one of great practical importance (see Pet. 20-21), nor do respondents deny that the broad jurisdictional rule adopted by the Kansas Supreme Court will lead to a tremendous expansion in the scope of specific personal jurisdiction by state courts. See Pet. 12-14; see also Amicus Curiae Brief of Product Liability Advisory Council, Inc. Instead, respondents advance three flawed reasons why this Court should nonetheless deny review.

First, respondents assert (Br. in Opp. 11-13) that this Court already has provided substantial guidance with respect to the due process limits on personal jurisdiction and that further review "would not advance the jurisdictional inquiry in any meaningful manner" (Br. in Opp. 11). Any divergence in approach among the lower courts is, they suggest, an unavoidable result of the fact-bound nature of the jurisdictional inquiry. But this Court in *Helicopteros* specifically identified—and reserved decision of—the unsettled legal issue that is dispositive in this case: what standard a court should apply in deciding whether a particular claim arises out of or relates to a defendant's purposeful contacts with the forum. See 466 U.S. at 415 & n.10. And courts and commentators have observed that the lower courts now apply different standards in making this determination. See Pet. 19-20. In the face of these authorities, which respondents do not challenge, respondents' assertion that this case would not enable the Court to provide guidance to the lower courts with respect to an unsettled question of law is quite bewildering.[1]

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[1] Respondents suggest (Br. in Opp. 7) that assessing the connection between the defendant's forum contacts and the cause of action is simply "part of determining the reasonableness of jurisdiction." Respondents have misread this Court's decisions, which require that a plaintiff seeking to establish specific personal jurisdiction over a nonresident defendant show that (1) the defendant initiated sufficient purposeful contacts with the forum; (2) the claim arises

Second, respondents suggest (Br. in Opp. 11-12) that in seeking an answer to the question left open in *Helicopteros* we are urging the Court to adopt a " 'talismanic jurisdictional formula.' " That is nonsense. This Court need not and should not lay down a fixed formula; it should simply provide the lower courts with guidance as to the nature of the connection between forum contacts and cause of action that due process requires. Just as this Court's recent pronouncements on the "purposeful availment" standard guide the lower courts in determining which of the contacts between a defendant and the forum are relevant for personal jurisdiction purposes, the Court's determination in this case regarding the necessary connection between a defendant's forum contact and the plaintiff's cause of action will assist the lower courts in determining whether due process allows the exercise of specific jurisdiction in a particular case. As the Sixth Circuit recently observed, "[m]ore sharply defined standards might well reduce miscalculations on the part of lawyers who, not surprisingly, normally seek a home court advantage if they think they see some chance of getting it—and it is not inconceivable that clearer standards might lead to more expeditious and efficient resolution of those jurisdictional questions that counsel choose to fight out in court." *LAK, Inc.* v. *Deer Creek Enterprises*, 885 F.2d 1293, 1304 n.7 (6th Cir. 1989).

Finally, respondents contend (Br. in Opp. 11-15) that the present case is an inappropriate vehicle for addressing this "nexus" question, because the connection between Playtex's contacts with Kansas and respondents' suit on the insurance contracts is sufficiently close to

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out of or is related to those contacts; and (3) the assertion of jurisdiction over the defendant is fair. See *Helicopteros*, 466 U.S. at 415 & n.10; see also *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462 (1985). As respondents themselves indicate (Br. in Opp. 13 n.7), the lower courts have followed this three-step approach. Determining whether the claim is sufficiently related to the contacts is thus an independent inquiry.

satisfy any possible standard. To begin with, respondents do not deny that the Kansas Supreme Court applied a "but for" test—the loosest possible "nexus" standard. Respondents' self-serving assertions about the result that the lower court might have reached had it applied a more stringent test are therefore beside the point. Playtex is entitled to a *judicial* application of the correct legal standard to the facts of this case.

In any event, respondents are plainly wrong in asserting that specific jurisdiction over Playtex would be upheld under the "substantive relevance" test. See Pet. 20. They reach this conclusion by arguing that the tort action in federal district court in Kansas and the resulting judgment constitute relevant contacts between Playtex and Kansas. But, as we discuss below, those contacts (which were *not* the basis for the Kansas Supreme Court's decision) were not initiated by Playtex and therefore cannot be considered in the jurisdictional analysis. Because the only contact relied on by the court below—the marketing of Playtex's products—is legally *irrelevant* to respondents' contract claim, the result in this case would have been different had the Kansas court applied the more restrictive "substantive relevance" standard applied by other courts.

Respondents' analysis also proceeds from the wholly mistaken premise that the only alternative to the "but for" test is the "substantive relevance" test. This Court might well decide to fashion its own standard drawn from its personal jurisdiction decisions. As we discussed in the petition (at 10-17), the sole purposeful contact between Playtex and Kansas—the marketing of Playtex products in that State—would not satisfy such a standard, because the connection between that contact and the insurance dispute is far too remote.

In sum, respondents have not presented a single plausible reason why the issue presented in the certiorari petition should not be reviewed by this Court.

B. The Kansas Supreme Court's Decision Is Erroneous.

We showed in the certiorari petition (at 10-17) that the Kansas Supreme Court erred in concluding that respondents' contract claim arises out of or is related to the sale of Playtex products in that State. Although respondents purport to meet our argument by defending the reasoning of the Kansas Supreme Court, their response actually serves to illuminate the defects in the lower court's reasoning.

As a threshold matter, respondents confirm that the Kansas Supreme Court's extremely loose "nexus" standard effectively eliminates any distinction between specific and general jurisdiction: they agree with our conclusion (Pet. 12-13, 15) that under the Kansas court's approach a product manufacturer may be subjected to *general* jurisdiction in any state in which its products are distributed. See Br. in Opp. 9 n.4, 19-20. That highly unlikely result by itself shows that the lower court's analysis cannot be squared with this Court's precedents.

Even more revealing is respondents' own analysis of the nexus issue. Each time that respondents try to demonstrate the close connection between Playtex's Kansas contacts and the present lawsuit, they emphasize the relationship between this contract action and *the Kansas tort suit and judgment*. See, *e.g.*, Br. in Opp. 10, 14-15, 17 n.11, 21. The Kansas Supreme Court, however, did *not* base jurisdiction over this contract dispute on the presence of the tort litigation in Kansas. Instead, the court below relied on the distribution of Playtex products in Kansas (see Pet. App. 11a), a factor that respondents relegate to secondary status, when they mention it at all. The reason that respondents are reluctant to defend the Kansas court's rationale is not difficult to discern: the connection between the contract action and the product sales is quite attenuated, while the link between the tort suit and the contract actions at

least appears much closer. Respondents have been forced to rewrite the Kansas Supreme Court's decision in an effort to make it seem defensible.

But there was a reason why the Kansas Supreme Court focused on the distribution of Playtex products and placed virtually no weight on the presence in Kansas of the underlying tort litigation. A contact counts for jurisdictional purposes only if it is initiated by the defendant. See *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980); Pet. 13 n.5. Playtex did not initiate the tort suit; it was haled into federal district court as a defendant. The tort litigation therefore does not constitute a separate jurisdictional contact for purposes of due process analysis. (Respondents' wholly unconvincing responses to this argument (Br. in Opp. 17 n.11) are further evidence of its correctness.)[2]

With respondents' embroidery stripped away, it is apparent that there is not a sufficiently close relationship between this action on the insurance contracts and the retail sale of Playtex products in Kansas. Upholding specific jurisdiction here would go far beyond the prior cases considered by the Court, in which jurisdiction over the defendant in a tort action seeking damages for injury inflicted by the defendant's product was based on the distribution of that product within the state (see, *e.g.*, *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770 (1984)) and jurisdiction over the defendant in a contract action was based upon the making and performance

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[2] Moreover, it is far from clear that Playtex's participation in the tort litigation would constitute a relevant contact under state law. The Kansas courts concluded that Playtex was subject to jurisdiction under the state long arm statute because the claim arose from the "'[t]ransaction of business'" in Kansas (Pet. App. 9a (citation omitted)). It is most unlikely that a defendant's involuntary participation in litigation would be considered "transact[ing] * * * business" under Kansas law. Accordingly, respondents are forced to defend the Kansas Supreme Court's ruling on a basis that would violate state law.

of the contract within the state (*Burger King Corp.*, *supra*).

Like the Kansas Supreme Court, respondents never come to grips with the fact that this case involves a relationship between forum contacts and cause of action significantly more attenuated than that present in any prior case.[3] Respondents simply assert repeatedly that there is a sufficiently close relationship here, relying upon that conclusory incantation as a substitute for analysis. Upon examination, however, the relationship here is far too remote to satisfy due process. See Pet. 12-17. The decision below accordingly should not be permitted to stand.

II. THE CHOICE OF LAW ISSUE ALSO WARRANTS THIS COURT'S ATTENTION

The Kansas Supreme Court held that its choice of law decision comported with due process because Kansas public policy required the application of Kansas law. Respondents do not defend that rationale, apparently recognizing that it is inconsistent with this Court's precedents. See Pet. 23-24. Respondents instead agree that the governing rule is the standard set forth in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), and assert that the lower court's determination may be upheld under that test.

The similarity between the jurisdiction and choice of law inquiries underlines the significant "gatekeeping" function performed by the due process limits on personal jurisdiction. Once a forum may assert jurisdiction over a non-resident defendant, the Constitution affords it con-

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[3] Thus, respondents argue (Br. in Opp. 18) that Playtex could have foreseen being haled into court in Kansas, because the insurance contracts covered risks arising in Kansas. But the fact that Playtex might have been able to foresee defending product liability tort actions in Kansas would not give Playtex any reason to foresee being haled into a Kansas court in an action on the insurance contracts themselves.

siderable leeway in adjudicating the dispute. The forum has considerable discretion in both choosing the applicable substantive law and applying that substantive law to the particular case. See *Sun Oil Co.* v. *Wortman*, 108 S. Ct. 2117, 2126-2128 (1988); *Phillips Petroleum Co.* v. *Shutts*, *supra*. For example, the forum may apply its own statute of limitations. *Sun Oil Co.* v. *Wortman*, 108 S. Ct. at 2120-2126. Because the constitutional constraints on choice-of-law are relatively loose, fairness and federalism interests are most effectively protected at the outset—by limiting the forum's power to assert jurisdiction over a nonresident defendant—if they are to be protected at all.

Respondents' arguments with respect to the choice of law issue are for the most part a reprise of their contentions with respect to the jurisdictional issue, but a few additional points are worth noting. To begin with, respondents' *Shutts* analysis proceeds (Br. in Opp. 24-25) from the wholly unsupported premise that Delaware law may not be applied to this dispute. Delaware, which is Playtex's state of incorporation and the place where payment was to be made under the policies, plainly has a sufficient interest in this dispute to apply its own law.[4]

Furthermore, respondents rest much of their argument on the choice of law principles codified in the *Restatement (Second) of Conflict of Laws* (see Br. in Opp. 26-27 & n. 17). But respondents conveniently ignore the fact that the Restatement accords considerably less significance to the state in which the risk is located

[4] Respondents' discussion (Br. in Opp. 18-19) of the terms of the insurance policies is misleading. Despite respondents' frequent references to "ultimate net loss," there is no dispute that the policies were pure indemnity contracts. Moreover, the "ultimate net loss" in the Kansas tort action was paid in Kansas only because respondents chose to pay the plaintiff directly rather than (as the policies provided) paying Playtex in Delaware. Significantly, any indemnity payment to Playtex of punitive damages would take place in Delaware.

"where the policy covers a group of risks that are scattered throughout two or more states." *Restatement (Second) of Conflict of Laws* § 193, comment b (1971).

Finally, respondents err in their portrayal of the expectation of the parties regarding the applicable law. Playtex's disclosure in an SEC filing of the truism that "certain state laws place limitations on coverage for punitive damages" (Br. in Opp. 29) says nothing about whether Playtex expected Kansas law to apply in a particular case. And the fact that a Playtex witness testified that the applicable law would be determined on a case-by-case basis (*ibid.*) does not stand for the proposition that Playtex was aware that Kansas law might apply to these insurance contracts, but rather evidences the parties' understanding that a state with appropriate jurisdiction over an insurance contract dispute would apply its legal rules, including its choice of law rules, to resolve that dispute.

In sum, respondents have not presented a single convincing reason why the Court should decline to review the judgment in this case, which "cannot be squared at any level with this Court's decisions" (Am. Br. 4). The petition should be granted with respect to both questions.

Respectfully submitted.

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